No. 80-992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS FITZPATRICK, *et al.*,

Petitioners,

v.

EDWARD L. KIRKLAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the Question Presented inaccurately reflects what they seek this Court to review. This case presents no questions concerning federal constitutional or statutory provisions. Petitioners simply disagree with the lower courts' construction of a

particular section of the Uniform Guidelines on Employee Selection Procedures, 29 CFR §16.071., et seq., as promulgated by the Equal Employment Opportunity Commission ("EEOC") in 43(166) Fed. Reg. 38290 et seq. (hereafter the Guidelines).[1/]

Petitioners themselves concede the narrowness of the issue: "it is the manner of the application of the EEOC Guidelines in the particular facts of this case as they have developed since the first Court of Appeals decision to which petitioners object." Pet. at 15 (emphasis added). Although petitioners allude to questions regarding the underlying liability issue, they themselves recognize that the liability issue was finally determined long ago by the first opinion of the Court of Appeals (520 F.2d 420), and no review of that finding was ever sought. See Pet. at 14.

The full history of this 10-year-old litigation and many of the pertinent facts are set forth

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1/ The section at issue is § 16.07.14B(8)(d). The text of this section and the related section, 14B(8)(a), is set forth in the petition. Pet. at 10, 11 and Pet. App. M-5, 6.

in the two reported opinions of the Second Circuit. See, 520 F.2d 420, 422-423; 426 (1975); 628 F.2d 796, 797-98 (1980)(Pet. App. H-7 to 11; A-3 to 9).[2/] The remainder of this section of the brief discusses the posture of the instant case.

By order of the district court, dated July 31, 1974, Examination No. 34-944 was declared unconstitutional and defendants[3/] were ordered to develop an examination validated in accordance with the Guidelines. July 31, 1974 Order, ¶¶ 1 and 3(b), 8 EPD ¶9675 at 5838 (Pet. App. F-2, F-3 to 4). The validation was to be of the type known as "criterion validity" to the extent it was feasible. July 31, 1974 Order, ¶ 3(c), 8 EPD at 5838 (Pet. App. F-4). Pursuant to that directive, defendants developed Examination No. 36-435. Defendants presented the criterion validity

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2/ Citations in this form refer to the appendix to the petition.

3/ Respondents include the New York State Department of Correctional Services and the New York State Civil Service Commission, as well as the original plaintiffs. In order to distinguish between the two sets of respondents, we refer to the respondents as plaintiffs and defendants.

study to the district court for its approval, and plaintiffs consented to the entry of an order granting the approval sought. 482 F.Supp. at 1181 (Pet. App. B-3). Petitioners filed a proposed complaint in intervention (Pet. App. K). Plaintiffs and defendants moved for summary judgment, and the district court granted that motion. 482 F.Supp. at 1181 (Pet. App. B-6).

The district court first found that no triable issues of material fact barred the motion (Pet. App. B-6 to 7). At no point in the proceedings had petitioners provided, or offered to provide, affidavits or other proof to oppose the technical aspects of the study or the opinions of plaintiffs' and defendants' experts. 482 F. Supp. at 1182 (Pet. App. B-9 to 10).[4/]

The district court then held that the proposed addition of only 250 points out of a maximum of 8830 (Pet. App. L-7), to the scores of minority candidates conformed with the Guide-

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4/ Only at this late hour do petitioners raise such issues by urging this Court to "evaluate the [defendants'] methodology" (Pet. at 11); however, even here they offer no additional facts. Cf. 628 F.2d at 797 n.1.

lines. Id. (Pet. App. B-9). It assured compatibility between the probability of successful job performance and the probability of being selected. Id., quoting Guidelines. It was not a quota in violation of the Second Circuit's prior decision (520 F.2d at 427-30), since it did not establish a fixed ratio of minority appointments without regard to test and job performance. 482 F. Supp. at 1181 (Pet. App. B-8).

The Second Circuit affirmed the district court's grant of summary judgment. 628 F.2d at 798 (Pet. App. A-6). Agreeing with the district court that petitioners had raised no triable issues of material fact, it held the 250-point adjustment was neither a quota nor forbidden reverse discrimination, but, rather, was a proper and necessary method of implementing the relief previously ordered. 628 F.2d at 799, 801 (Pet. A-9, 13). Petitioners do not question the propriety of deciding the remedy issue on a motion for summary judgment; hence, like the liability determination, the facts involved are not in dispute.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for two reasons. (1) The Court of Appeals properly affirmed the district court's exercise of discretion in implementing a remedy for a previously found consitutional violation. (2) The decision of the Court of Appeals is consistent with the decisions of other circuits and of this Court.

ARGUMENT

Reasons For Denying The Writ

I. IN UPHOLDING THE DISTRICT COURT'S APPROVAL OF EXAMINATION NO. 36-435, THE SECOND CIRCUIT PROPERLY AFFIRMED AN APPROPRIATE REMEDY FOR A SETTLED CONSTITUTIONAL VIOLATION.

In affirming the district court's decision sanctioning examination no. 36-435, the Second Circuit Court of Appeals approved an appropriate remedy, while properly acknowledging the inherent power of the district court to implement a decree remedying a constitutional violation.

The duty of a district court upon a finding of unconstitutional racial discrimination is settled by decisions of this court:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). This principle has been held to be equally applicable to cases involving the framing of remedies for illegal employment discrimination:

> Where racial discrimination is concerned, 'the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'

Albemarle Paper Company v. Moody, 422 U.S. 405, 418 (1975), quoting Louisiana v. United States, 380 U.S. 145, 154 (1965). See also, Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976), and Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

The earlier opinion of the Second Circuit upheld the finding that the examination for promotion to the position of Correction Sergeant administered in 1972 (examination no. 34-944) was discriminatory, in violation of the Constitution. 520 F.2d at 426 (Pet. App. H-10). Petitioners concede that they do not challenge this finding (Pet. at 14). The earlier opinion also approved in its entirety the remedy ordered by the district court as it related to the development of a new, validated selection procedure. Id. (Pet. App. H-11).

The district court's order merely implemented that remedy, and it provided for no more than would be necessary to effect present compliance with Title VII "and to prevent future discrimination of the kind found to have existed earlier in this case." 628 F.2d at 798 (Pet. App. A-6). Albemarle Paper Co v. Moody, supra. The appellate court's task was thus simply that of examining the implementation of the remedy, and, after considering all objections, determining that the district court had carried out its mandate and had not

abused its discretion. There is, therefore, no question for this Court to review.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Despite their recognition that all this case involves is interpretation of an administrative regulation, petitioners vainly attempt to set forth reasons for a grant of certiorari.

Petitioners argue that this Court should grant certiorari because of an asserted "expansion" of the scope of Albemarle v. Moody, supra (Pet. at 21) or a misapplication of the principles of Washington v. Davis, 426 U.S. 229 (1976) (Pet. at 26), and based on their mistaken contention that the 250-point adjustment constitutes a minority preference or quota that contravenes the holding in University of California Regents v. Bakke, 438 U.S. 265 (1978)(Pet. at 24). None of these implied conflicts exists.[5/]

5/ Petitioners do not assert any conflict among the circuits (Sup. Ct. R. 17.1(a)). Indeed, most courts of appeals have cited the

Recent decisions of this Court have endorsed the Guidelines, see Detroit Edison Company v. NLRB, 440 U.S. 301, 313 (1979), Dothard v. Rawlin-

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5/ continued

Guidelines with approval and often have endorsed the concept of differential validity. See, e.g., Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1026 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. City of Miami, 614 F.2d 1322, 1344 (5th Cir. 1980); Sims v. Sheet Metal Workers International Assn., 489 F.2d 1023, 1025 (6th Cir. 1973); United States v. City of Chicago, 549 F.2d 415, 433 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); Donnell v. General Motors Corp., 576 F.2d 1292, 1299-1300 (8th Cir. 1978); Blake v. City of Los Angeles, 595 F.2d 1367, 1379 (9th Cir. 1978), cert. denied, ___ U.S. ___, 100 S. Ct. 1865 (1980); Douglas v. Hampton, 512 F.2d 976, 986-87 (D.C. Cir. 1975). In United States v. City of Chicago, supra, the court noted ". . . the EEOC Guidelines require that an examination be validated for both minorities and whites. . . . We do not consider this requirement a mere technicality." See also, Rogers v. International Paper Co., 510 F.2d 1340, 1350 (8th Cir. 1975); Stamps v. Detroit Edison Co., 365 F.Supp. 87, 117 (E.D. Mich. 1973), modified, 515 F.2d 201 (6th Cir. 1975)(". . . it

son, 433 U.S. 321, 332 (1977) and Albemarle Paper Co. v. Moody, supra. In Albemarle, this Court expressly approved differential validation of employment tests, noting that the Guidelines were entitled to "great deference". 422 U.S. at 431, quoting from Griggs v. Duke Power Company, 401 U.S. 424, 433-34 (1971). The Court of Appeals has not expanded the concept of differential validation; it has merely affirmed the district court's interpretation of the provision in the Guidelines that covers the steps that may be taken once a differential validity study shows the existence of "unfairness".6/ Were defendants to have ignored

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5/ continued

becomes [defendant's] burden to prove that these test batteries are valid predictors of job performance for blacks as a separate group where feasible. . . ."), concept approved on appeal, 515 F.2d at 313.

6/ As the Court of Appeals noted,

> . . . once the results of . . . a [differential validity] comparison indicate a discrepancy, the responsible authorities have a choice. They can return to the drawing board and design a new test meant to correlate to job performance ratings; or they can adjust

the evidence of unfairness and used the results of the examination without modification, "whites with a particular level of job performance would be selected at a higher rate than blacks and hispanics with the same measured job performance." (Pet. App. L-6, 7). Thus, contrary to petitioners' assertions, it is only in the absence of the 250-point adjustment that a racial preference occurs, since in that case lesser qualified whites would have been selected over better qualified minorities. The action taken here by defendants is clearly within the contours of Albemarle, as five members of this Court recognized in Bakke.[7/]

6/ continued

> the test to bring the results into conformity with those ratings. See 29 C.F.R. § 1607.-14(8)(d). In this case, they chose the latter course of action, an alternative clearly foreseen by our prior opinion.

628 F.2d at 799 (Pet. App. A-8, 9).

7/ After describing an example of differential validity, in a concurring opinion Mr. Justice Brennan noted the following:

> By implication, were it determined that a test score of 50 for a minority corresponded

Nor does Washington v. Davis, supra, forbid adherence to the Guidelines in developing a non-discriminatory selection procedure, even in a non-Title VII case. That decision holds only that no one type of validation is mandated by the Constitution. 426 U.S. at 250-51. Petitioners do not contend it was error for the defendants to follow the Guidelines in developing the latest examination. Nor are they able to demonstrate any error in the District Judge's "sensible construction" of Section 14B (8)(d) of the Guidelines. Cf. 426 U.S. at 251-52.[8/]

7/ continued

> in "potential for employment" to a 60 for whites, the test could not be used consistently with Title VII unless the employer hired minorities with scores of 50 even though he might not hire non-minority applicants with scores above 50 but below 60.

Id., 438 U.S. at 364 n.37 (opinion joined by Mr. Justice White, Mr. Justice Marshall and Mr. Justice Blackmun). See also Id. at 306 n.43 (opinion of Mr. Justice Powell).

8/ Petitioners appear to object only to the district court's reliance on a communication with the General Counsel of the very agency that drafted the Guidelines and the lack of judicial precedent for the precise interpretation (Pet. at 12).

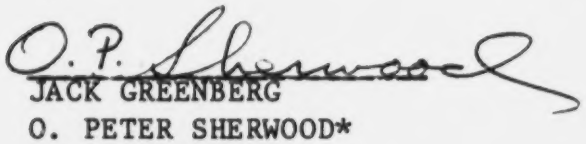
While petitioners correctly note that this Court has shown a "concern regarding racial preference." Pet. at 25, in each instance where this Court has been presented with such questions, it has approved the use of racial distinctions, as an appropriate equitable remedy. See, e.g., Bakke, supra; United Steelworkers of America v. Weber, 443 U.S. 193 (1979), Fullilove v. Klutznik, ____ U.S.____, 65 L.Ed.2d 902, 927 (1980) and Franks v. Bowman Transportation Co., supra. Here, however, as Mr. Justice Powell recognized in Bakke, the issue is not a quota or a preference for one group over another, but the perfection of a testing instrument within the limits of the current state of the art:

> To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. 438 U.S. supra, at 306 n. 43 [emphasis added].

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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